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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

SHEMUAL N. YISRAEL,

APPELLANT

APPELLATE CASE NO. 2022-001044

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# FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

I.

Appellant did not knowingly, intelligently, and voluntarily waive his right to counsel, where the court did not engage in a colloquy with Appellant pursuant to *Faretta v. California*, 422 U.S. 806 (1975), and where the record does not show he had sufficient background to appreciate the dangers and disadvantages of self-representation.

Tellingly, the State does not discuss the application of the *Cash* factors[1] to this case in its Brief of Respondent. That is because the analysis favors Appellant. *See* Brief of Appellant at 9 – 11. Instead, the State argues the solicitor's June 10, 2022, pretrial continuance motion shows a knowing, voluntary, and intelligent waiver of the right to counsel under *Faretta*. *See* Brief of Respondent at 6 – 8. That hearing fails to tilt the *Faretta* analysis in the State's favor— although the judge informed Appellant of his right to counsel and encouraged Appellant to get a lawyer, he did not discuss the dangers and disadvantages of self-representation; he merely stated Appellant should get a lawyer. This was insufficient to comply with *Faretta v. California*, 422 at 835, which held the defendant must be informed of the dangers and disadvantages of self-representation, or the record must show he had sufficient background to those dangers and disadvantages before he waives his right to counsel.

"The Sixth Amendment requires that before a criminal defendant may represent himself, the trial court must hold a hearing to determine the defendant has knowingly and intelligently waived his right to counsel." *Hines v. State*, Op. No. 28205 (S.C. Sup. Ct. filed May 29, 2024) (Howard Adv. Sh. No. 20 at 12) (citing *Watts v. State*, 347 S.C. 399, 402-03, 556 S.E.2d 368, 370 (2001)). "Where, as in *Faretta*, the defendant is venturing to represent himself at trial, the

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[1] *State v. Cash*, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992); *see Gardner v. State*, 351 S.C. 407, 412-13, 570 S.E.2d 184, 186-87 (2002) (same).

trial court must rigorously convey specific warnings of the pitfalls of going to trial without a lawyer." *Hines*, Op. No. 28205 (citing *Iowa v. Tovar*, 541 U.S. 77, 89 (2004)). "The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*, 541 U.S. at 88 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

The State leans heavily on the June 10, 2022, continuance hearing. *See* Brief of Respondent at 6 – 8. However, that hearing supports Appellant's argument as to the first *Cash* factor—the accused's age, educational background, and physical and mental health weighs in favor of finding the waiver was not knowing and intelligent. Appellant gave a nonresponsive answer to the judge's question when the judge asked Appellant to provide the court with his email address, stating: "The only reason I came in today is to hopefully— . . . I don't want the FBI. Nobody wants to do anything for me." R. 13, l. 18 – 14, l. 2. In response, the court told Appellant the case would be tried, and the court stated: "Based on your history, who knows what you are telling me." R. 14, ll. 10-11. The judge and Appellant later discussed a civil case Appellant had brought in which Appellant, according to the judge, "subpoenaed the entire Yemassee police department here." R. 16, l. 19 – 17, l. 23. Appellant accused the court, as well as Judge Dickson and Judge Price of "signing fraudulent orders." R. 17, ll. 14-18. These

exchanges show that Appellant likely had serious mental or physical health problems affecting his faculties.

The June 10, 2022, motion hearing record does not show that the court informed Appellant he would be required to comply with the rules of procedure at trial (seventh *Cash* factor). It is less than an exchange of pro forma answers to pro forma questions, with the judge encouraging Appellant to get a lawyer, asking Appellant if he still wanted to represent himself, and Appellant saying he did (ninth *Cash* factor). However, it does show Appellant knew the nature of the charge and the possible penalty (third *Cash* factor).

This was a waiver of counsel at trial, which required the court to "rigorously convey specific warnings of the pitfalls of going to trial without a lawyer." *Hines*, Op. No. 28205; *Patterson v. Illinois*, 487 U.S. at 298 (same). The court did not convey specific warnings. The *Cash* factors discussed above, as well as those discussed in the Brief of Appellant, show that Appellant is entitled to a new trial, one with the benefit of counsel. *Watts v. State*, 347 S.C. at 402, 556 S.E.2d at 370 (where defendant's choice to proceed pro se was not made with eyes open, a knowing and voluntary waiver of counsel was not effectuated, and the case should be remanded for a new trial).

## CONCLUSION

Based on the foregoing argument, and for the reasons contained in Appellant's principal brief, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2024.

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have been served upon Ambree M. Muller, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 19th day of August, 2024.

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